Supreme Court, U.S.
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No. 95-658

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ADIN FALKOFF -
PETITIONER

vs-

INTERNATIONAL BUSINESS MACHINES
CORPORATION -
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF

Adin Falkoff, Pro se
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Pleasantville, NY 10570
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November 15, 1995

BEST AVAILABLE COPY

22 pp

INTRODUCTION

The attention of the Court is respectfully drawn to an article in the November 6, 1995, issue of *The National Law Journal* under the rubric, "Employment Law,"[1] in which the instant case, Misek-Falkoff v. IBM, is one of three cases the authors use in a discussion of how current laws apply to telecommuting.[2] The article raises the question of whether an employer can be compelled to allow disabled employees to telecommute, and concludes that the courts in various Circuits differ on the issue. However, in the course of the discussion the article makes assertions about the plaintiff, Dr. Misek-Falkoff, which, though based on the authors' reading of the Memorandum Order of the District Court, are not in accord with the actual facts. The discrepancy can be traced back to deliberate obfuscation, by defendant IBM's attorneys and witnesses, of the true nature of the plaintiff's job at the time of her involuntary placement on total disability status in 1987. Publication of this article highlights the fact that the defendant comes to the Court with unclean hands and should therefore not be entitled to the affirmative defense of *res judicata*.

THE DECEPTIVE STRATEGEM

Regarding this case, the article in the *National Law Journal* states as follows:

> ". . . in *Misek-Falkoff v. IBM*, Judge Vincent L. Broderick, of the Southern District of New York, found it acceptable for the employer to reject the telecommuting option because the plaintiff's duties as a developer and manufacturer of computer systems required her actual presence in the workplace. The plaintiff conceded at her deposition that an essential part of her job was to collaborate with other employees and attend meetings and training sessions." [Underline added.] (This excerpt and associated portions of the article are shown in Exhibit 1.)

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[1] Allan H. Weitzman & Kathleen M. McKenna, *Employment Law: With millions of Americans telecommuting, businesses must determine how current laws apply to this new form of work*, Nat'l L. J., Nov. 6, 1995 at B4, B6.

[2] That is, working from home or another alternative work site enabled by new information technologies such as personal computers, groupwork-facilitating software, facsimile machines, and teleconferencing equipment.

In point of fact, plaintiff made no such concession at her deposition or elsewhere. The underlined phrase derives from a statement in the District Court Order[3] which refers to "plaintiff's own definition of her duties at deposition," which, in turn, derives from material on the subject put before the court by the defendant. This deliberately misleading material was mainly an exhibit ("Exhibit J" of IBM's Reply of June 3, 1993, reproduced here in its entirety as Exhibit 3) comprising only that part of a deposition which described the work activities of the plaintiff's job assignments prior to 1985, leaving out preceding deposition pages (shown here as Exhibit 2) which would have made clear that these were not activities of her job for the two years leading up to when she was put out on disability in July, 1987. Affidavits in the aforementioned Reply, by the attorney who conducted the deposition, and others, then cited the job descriptions in "Exhibit J" to give false authority to statements about plaintiff's job which simply did not apply during the time period critical to the litigation and judgment.

Appendix H of this petition, a reproduction of the Brief of Plaintiff-Appellant placed before the Second Circuit Court of Appeals, describes, on pages 33-35 (shown again here as Exhibit 4), the clear difference between Dr. Misek-Falkoff's job activities before and after mid-1985 (footnotes 28 and 29), and how the misleading "Exhibit J" was used to confuse the situation and thereby deceive the court on a crucial point.

DISCUSSION

It is a well established principle that an affirmative defense is not available to a party with unclean hands. The cited article shows that the subject matter of the deception practiced on the District Court was material and important in this case. Hence, regardless of the result of this attempt to improperly influence the outcome, use of such a deceptive strategem should have perforce vitiated the affirmative defense of *res judicata*.

Inasmuch as the Brief of Plaintiff-Appellant submitted to the Court of Appeals did describe the deception, it must be asked why that court gave no recognition to a matter of fundamental importance. One answer may be that papers by *pro se* litigants are simply not

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[3] *Misek-Falkoff & Falkoff v. International Business Machines Corp.*, 854 F.Supp. 215, 226-227; Petition Appendix C, p. 18

given the same weight as those by members of the Bar, or the Court of Appeals' neglect of this issue may be considered another aspect of departure from the usual course of judicial proceedings that requires the exercise of this Court's power of supervision.

CONCLUSION

The publication and republication of wrong and false information is hurtful to the parties involved and harmful to the fabric of society. I have seen how the principal plaintiff in this action has been adversely affected by the untruths propagated about her in the litigation papers and consequent published decisions, and I ask that this Court exercise its powers of review to mandate a more responsible search for the truth, so as to reinforce the potential of the judicial process to have a healing, rather than a destructive, effect.

Dated, November 16, 1995

Respectfully submitted,

Adin Falkoff

Adin Falkoff, pro se petitioner

Employment Law *Allan H. Weitzman • Kathleen M. McKenna*

With millions of Americans telecommuting, businesses must determine how current laws apply to this new form of work.

. . .

The ADA does not address telecommuting directly. Because the law requires employers to make reasonable accommodations for disabled workers, however, home offices and telecommunication centers must be considered as options. There are few reported decisions on this topic, and the courts appear to be divided on the circumstances in which an employer can be compelled to allow disabled employees to work at home.

The U.S. Court of Appeals for the District of Columbia Circuit and one federal district court judge have determined that employers are required to consider telecommuting for employees as a potential form of accommodation but are permitted to reject this option in the appropriate circumstances. In *Carr v. Reno*, the D.C. Circuit found it reasonable for the U.S. attorney's office to reject the option of telecommuting for the plaintiff — a coding clerk — when the plaintiff herself admitted that her job tasks could not properly be performed at home.

Similarly, in *Misek-Falkoff v. IBM*, Judge Vincent L. Broderick, of the Southern District of New York, found it acceptable for the employer to reject the telecommuting option because the plaintiff's duties as a developer and manufacturer of computer systems required her actual presence in the workplace. The plaintiff conceded at her deposition that an essential part of her job was to collaborate with other employees and attend meetings and training sessions.

The judge reasoned that in these circumstances, the employer was not required to allow the disabled employee to telecommute. As he explained, "[a]n employer may certainly require an employee's presence at the workplace when interaction with others is essential to the task to be performed."

Exhibit 1. *Excerpt from article in* The National Law Journal

Courts differ on the issue of whether an employer can be compelled to allow disabled employees to telecommute.

These decisions do not discuss whether plaintiffs' jobs required their presence on a daily basis. Thus, it was left unresolved whether the employers would be required to allow the employees to telecommute two or three days per week as a reasonable accommodation under the ADA.

The 7th Circuit has taken the position that an employer generally is not required to accommodate a disability by allowing the employee to work at home. In *Vande Zande v. State Department of Administration*, the plaintiff worked for the housing division of the Wisconsin Department of Administration as a program assistant. Her tasks were of a clerical and secretarial nature. In 1992, she suffered from ulcers and needed to take an eight-week sick leave. Lori Vande Sande asked her supervisor if he would provide her with a desktop computer so that she could work full-time at home during her medical leave. Her supervisor refused.

Ms. Vande Zande filed suit, alleging that the employer's refusal constituted a failure to reasonably accommodate her disability. She argued that under the ADA, her employer was required to install a computer in her home and allow her to work full-time there. The court disagreed, finding that the concept of "reasonable accommodation" does not require an employer "to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced.

Additionally, the court stated that in most jobs, employees are required to work in supervised groups. "[T]eam work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance." Thus, the 7th Circuit seemingly has taken the position that telecommuting is a "reasonable accommodation" only in extraordinary circumstances.

Exhibit 1. *Excerpt from article in* The National Law Journal

The 5th Circuit, however, apparently does not agree that telecommuting is required only in exceptional cases. In *Anzalone v. Allstate Insurance Co.*, Judge Sarah S. Vance stated that "[q]uestions of reasonable accommodation are specific to the nature of the job, the individual, and the disability" and the determination must be made on a case by case basis. After evaluating the particular facts of Antonino Anzalone's claim, the court concluded that the distinct nature of his employment made telecommuting a "reasonable accommodation."

Specifically, the court found that Mr. Anzalone was a claims adjuster who spent a substantial part of his time working in the field. Most of his job functions ordinarily were conducted outside of the office. Therefore, the need for his presence in the office was greatly diminished, and it was not evident that Mr. Anzalone's productivity would decrease if he worked at home.

Additionally there was evidence that Allstate permitted other claims adjusters to work out of their homes. This practice undermined the employer's argument that telecommuting created an "undue hardship."

Thus, the ADA may, depending on the circumstances, force employers to comply by offering telecommuting as another avenue for accommodating disabled workers. Therefore, it is important for an employer to evaluate carefully the job held by a disabled employee to determine whether telecommuting is a reasonable option. Thus far, the cases teach that if the employee is able to perform his or her essential functions effectively at home, there may be an obligation to allow the individual to telecommute unless such an arrangement would create an undue hardship.

. . .

Mr. Weitzman and Ms. McKenna, Business Watch columnists, are partners at the Boca Raton, Fla., and Clifton, N.J., offices of New York's Proskauer Rose Goetz & Mendelsohn L.L.P., where they practice labor and employment law. Ilene Freier, an associate in the firm's New York office, assisted in the preparation of this article.

Exhibit 1. *Excerpt from article in* The National Law Journal

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LINDA D. MISEK-FALKOFF and ADIN FALKOFF,

Plaintiffs,

-against-

89 Civ. 6269

INTERNATIONAL BUSINESS MACHINES, CORP.,

Defendant

----------x

February 19, 1991
10:35 a.m.

Deposition of plaintiff LINDA D. MISEK-FALKOFF taken by Defendant, pursuant to notice, held at the offices of Seward & Kissel, Esqs., One Battery Park Plaza, New York, New York, before Joseph R. Danyo, a Shorthand Reporter and Notary Public within and for the State of New York.

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WALTER SHAPIRO, CSR
CHARLES SHAPIRO, CSR

369 LEXINGTON AVENUE
NEW YORK, N.Y. 10017
(212)867-8220

Exhibit 2. *Omitted deposition pages indicating time period*

EMPLOYMENT LAW *Allan H. Weitzman • Kathleen M. McKenna*

With millions of Americans telecommuting, businesses must determine how current laws apply to this new form of work.

THE PHENOMENON of telecommuting is bringing about fundamental changes in the workplace and, in the process, sparking an evolution of employment law. The familiar employment arrangement, under which employees commute to centralized offices, no longer is a universal standard.

Traditionally, employees were required to travel to the workplace "because that is where the tools, information, work-in-progress, files and other employees were located."[1] New information technologies—personal computers, facsimile machines and teleconferencing equipment—enable many employees to work as effectively from home or from an alternative work site. As a result, an increasing number of employers have recognized telecommuting as a viable alternative to the traditional work arrangement.

In fact, the last full week of October was officially observed as "National Telecommuting Week." According to experts in the area of "telework," almost 9 million American employees telecommuted in one form or another in 1994.[2] Link Resources Corp., an information industry research firm, predicts that this number will reach more than 13 million by 1998.[3]

Employers find the telecommuting option intriguing because it allows for office space savings and a reduction in overhead expenses, provides family-friendly work schedules for employees and increases employee job satisfaction and productivity. It also provides additional opportunities to individuals with disabilities who seek accommodation under the ADA, or Americans With Disabilities Act,[4] and for employees who may qualify for an unpaid leave under the Family and Medical Leave Act[5]—such as those caring for family members with serious health conditions—but who would prefer to work at home. By allowing these employees to work from home, employers may be able to retain skilled, trained employees and cut personnel costs.

Before implementing a telecommuting policy, it is important to evaluate the legal implications for managing employees who work from their homes. Telecommuting may affect an employer's compliance with the ADA and the FLSA, or Fair Labor Standards Act.[6]

The ADA does not address telecommuting directly. Because the law requires employers to make reasonable accommodations for disabled workers, however, home offices and telecommuting centers must be considered as options.[7] There are few reported decisions on this topic, and the courts appear to be divided on the circumstances in which an employer can be compelled to allow disabled employees to work at home.

The U.S. Court of Appeals for the District of Columbia Circuit and one federal district court judge have determined that employers are required to consider telecommuting for disabled employees as a potential form of accommodation but are permitted to reject this option in the appropriate circumstances.[8] In *Carr v. Reno*, the D.C. Circuit found it reasonable for the U.S. attorney's office to reject the option of telecommuting for the plaintiff—a coding clerk—when the plaintiff herself admitted that her job tasks could not properly be performed at home.

Similarly, in *Misek-Falkoff v. IBM*, Judge Vincent L. Broderick, of the Southern District of New York, found it acceptable for the employer to reject the telecommuting option because the plaintiff's duties as a developer and manufacturer of computer systems required her actual presence in the workplace. The

WHY YOU SHOULD ORDER THE

Exhibit 1. *Excerpt from article in* The National Law Journal
1

A. Yes.

Q. Did there come a time when you were promoted to staff systems analyst in the text processing group?

A. Yes, after I had been in this education group for a while.

Q. Do you recall when you were promoted to that position?

A. That could have been 1984. I haven't reviewed this in years.

Q. If I mentioned March of 1984, does that refresh your recollection?

A. It makes us agree, doesn't it? I don't know. I am trying to help you with some of the dates. Thank you.

Q. Does that refresh your recollection as to when you were promoted to staff systems analyst?

A. Yes, thank you.

Q. Does that also help you remember approximately when Ann Gruhn split the group into two groups?

A. I still say it could have been a year before because I was in education for a while, but

Exhibit 2. *Omitted deposition pages indicating time period*

no longer classified as a programmer because Ann said that I was not competitive as a programmer and shouldn't be in programming.

Q. During the period that you were a programmer, that is, the period before Ann Gruhn split the group into two groups, can you describe for me generally what your duties and responsibilities were as you understood them?

A. Across the board.

Q. Yes.

A. I meant that. That was the answer. Are you familiar with software engineering?

Q. Not really.

A. To make it very simple, not because -- excuse me. I mean to try to be general.

Q. Simple is fine with me.

A. As you know probably even in your own work, you decide something needs to be done and there is work going to be done gathering requirements and deciding what needs to be done, and then you look to getting up specifications with a cost benefit point of view, what they want, what it will cost both them and you and whether

Exhibit 2. *Omitted deposition pages indicating time period*

Q. When you taught, did you teach with any other IBM employees, in other words, did someone else assist you in teaching?

MS. GOLDEN: Objection to form.

A. I really don't understand the question. Do you mean were they standing up next to me?

Q. Right.

A. I think on a couple of occasions when Betty McCarthy and I graduated secretaries from the respective program, we were in the same room and alternately did parts of handing out the certificates.

Q. You also mentioned that part of your responsibilities included designing programming for others while you were in the education group.

A. Designing systems.

Q. Systems, I'm sorry.

A. I'm sorry?

Q. I said I was sorry.

A. I guess we are all sorry.

Q. The work that you did designing systems, can you describe that for me?

A. Which system would you like described

Exhibit 2. *Omitted deposition pages indicating time period*

because they used different underlying software bases?

Q. What I would like you to describe first is the procedure, functionally what you did?

A. Sir, I can't, any more than you can make me a lawyer in this room with your years of experience, make you a software engineer. Please be more specific.

Q. Did you design teaching programs --

MS. GOLDEN: Can we take a brief break so the witness can speak to her husband?

MR. GARLEY: Sure.

(Discussion off the record)

MS. GOLDEN: Before we resume the deposition, I wanted to put on the record that my client is not feeling very well. She has a headache and she has just taken some medication which may make her -- which may affect the way she answers questions, so you may want to ask her a little bit about the medicine.

MR. GARLEY: Off the record for a moment.

Exhibit 2. *Omitted deposition pages indicating time period*

questions, if you feel physically ill, I would ask that you tell us and that we will break.

A. Thank you.

Q. If necessary, we may also ask to adjourn.

A. Yes, thank you. Mr. Hankin informed me of this convention.

MR. GARLEY: Ms. Golden, I would like you to know that we are concerned about the capacity of the witness to testify. None of us know anything about these drugs so I don't know what effect they may have on someone, so we are also going to reserve our right to adjourn the deposition if it becomes apparent to us that Dr. Misek-Falkoff is having difficulty continuing.

MS. GOLDEN: O.K.

MR. GARLEY: That being said, off the record.

(Discussion off the record)

Q. I will try to be more specific. I think that the first question I want to ask was just describe how you go about designing systems,

Exhibit 2. *Omitted deposition pages indicating time period*

and if you need to say that there are different methods depending on different systems or whatever, feel free to do that.

A. Ordinarily a manager has a preference for a starting point that one investigates as an analyst. They prefer that it be a relational data base or something written in what is called a second language or combined with the more traditional languages, such as PLl, APL.

I can't think of too many other ones that I actually used. So you don't start off just guessing. You have direction from your manager, please explore, the availability, with the other consultants of the tools that you are going to use.

I must say that there are -- let me start again. "Systems" is a word that can be used in many ways, as you know. If you are talking about software systems -- computer software systems, that is the question I am answering. There were other intellectual pursuits I was engaged in with people at Watson where we were designing systems but they didn't have to do with coding. They were maybe taxonomies, coming up

Exhibit 2. *Omitted deposition pages indicating time period*

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LINDA D. MISEK-FALKOFF and ADIN FALKOFF,:

Plaintiffs, :

-against- :89 Civ. 6269

INTERNATIONAL BUSINESS MACHINES, CORP., :

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Defendant

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February 19, 1991
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CHARLES SHAPIRO, CSR

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Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

Appearances:

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One Battery Park Plaza
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BY: SCOTT R. GARLEY, ESQ.,
-and-
MICHAEL P. ENRIGHT, ESQ.,
of counsel

Also Present:

SALLY LU LAKE, ESQ.,
IBM Corporation

ADIN FALKOFF

oOo

Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

with taxonomies, cognitive science things, psychology things that it may be in the end they eventuated in a little experiment on a computer, but I wasn't part of that. I was part of the initial planning of these systems, meaning the conceptual system. I was afraid that was getting mixed up. We haven't even begun to talk about that.

Q. I will ask you in a few minutes about some examples of the software that you helped design, but at the moment I am just asking the physical steps, the functional steps of what you did to design software.

A. A computer software system, not a conceptual system.

Q. So in those instances where you designed computer software, did you do that with other people?

A. Definitely. Not the coding but the requirements gathering, and I would say the two nether ends, requirements and design, and when you test it, you try to test them with ergonomics experts, and we did, cognitive science people. Human factors. That was the general phrase. As

Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

well as eventual end users, secretaries, et cetera.

Q. How did you collect user requirements?

A. By speaking to a broad -- by defining a broad band width of potential users and judges of those users and of those systems. As I said, I think maybe I wasn't really clear, ranging from novice to expert users but also including those who critiqued such systems.

Q. Did you talk directly with those individuals?

A. Yes. I also assisted them in their own research and their own systems building, but right now you are asking about the systems for which I would be accredited, right?

Q. Correct.

A. Right.

Q. During I believe what you called the requirements and design phase, did you deal also with individuals in your own working group?

A. Sure.

Q. Were there particular individuals with whom you worked?

Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

A. I talked to everyone.

Q. Everybody in the text processing group?

A. They had different specialties, and you check out different aspects of what you are doing briefly to see if there was something they wanted to comment on, sure.

Q. You worked with everyone within your, I think you called the education group?

MS. GOLDEN: I object to the form.

Q. I am trying to find out what group you were referring to.

A. In no one project do I think I consulted with every one of them, but if you say accumulated three projects, they all would have been included, sure, that is how you do it.

Q. During the --

A. That is half of how you do it. The other half is you work with people outside of your project.

Q. With respect to the first half, that is, dealing with people within your group, can you describe the ways in which you met with them? Did you have group meetings, were there regularly

Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

scheduled meetings? I am giving you some examples.

A. It is helpful. Thank you.

We did have regular meetings where we shared ideas, and we would go around and talk about our current project and ask for input because we all had different specialties but we also met one on one in one another's office. We also dealt through electronic mail. We also served as subjects; in other words, someone would say, "It is not perfect but it is close, would you be willing to try it out." In a small family-like community, it is very hard to think off the top of my head of every way in which one interacts in a casual and friendly atmosphere. But definitely, I would say that interaction in your own group is about a third for building a system for 2,000 to 2500 users, and then they transport it to other locations.

Q. I don't know how to phrase this, but what would make up the other two-thirds?

A. You phrased it beautifully, and I apologize if I seem to be too interested in my feeling and not of yours.

Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

I worked with computer scientists, cognitive scientists, human factors people in the building, TJ Watson. I made trips to Eastview, Stormytown, met with patents, met with the attorneys there. With Project Respect, which was one of my main, I feel, achievements, I am pleased with it and I heard they are still using it, I visited with the physical science department administrator, and in fact, one of my earlier projects I met with the head of the department, I believe his name was Armstrong, and I met with six managers on that project, Model Shop.

You see it is so spread, you begin to understand my dilemma here. Six or seven discrete departments and personally interviewed them for their needs. And at other times they had projects and they would come to me for me to critique them. So it is a fluid community, the research center. I don't think it is quite as superficially structured maybe as a branch office or a sales point would be.

Q. What you just described would make up the other two-thirds of your time, your work time?

MS. GOLDEN: Objection to form.

Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

that information.

MR. GARLEY: Would you be able to respond to my letter regarding the document production prior to whatever date we agreed to?

MS. GOLDEN: Yes, I think so.

(Time noted: 4:50 p.m.)

[signed] Dr. L. D. Misek-Falkoff

subscribed and sworn to before me
this 26th day of July, 1991.
[signed] William D. Frumkin
[stamped] Notary Public, etc.

Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

employment, in light of the employer's official job description for a staff systems analyst and office educator.

But in late 1985 and continuing until the placement on forced disability status in mid-1987, plaintiff's job was severely narrowed to the point where her assigned tasks did not match the description of her former staff systems analyst job, and she was no longer an office educator[27]. Consequently the significance of absences and interpersonal relations was much less, and the District Court necessarily errs in accepting as a standard the employer's false depiction of the requirements at the time in question. Countervailing facts were before the Court, in the form of performance plan job descriptions (compare Answer Ex 21, Performance Plan of 1/28/86[28], and Answer Ex 20, Performance Plan of 1/11/84[29]), item

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[27] The change in assignment was punitive, and not by reason of any failure in performance, which was more than satisfactory in every aspect of her job. See footnotes below.

[28] The principle assignment after 1985 reads thus:

> Install TEX on Yorktown VM systems. Ensure that the installation is complete and verify that TEX works.
> Determine what printers are supported and what fonts and in what sizes are available for which printers.
> Understand and document existing procedures to use TEX.

Compare this with the last previous assignment described in the following footnote.

[29] The principle assignment prior to mid-1985 reads thus:

> Linda's main assignment is to establish a program to ensure that our users take advantage of the tools we have provided to improve productivity in the office. Her responsibilities include the following:
> * establish education programs to reach users who don't come to the RelEP sessions and who are using obsolete methods (e.g. executive secretaries, managers)
> * develop user documentation and teaching aids
> * investigate alternative approaches to self-education (e.g. combination of slides and taped monologues, videotape, online interactive sessions, learning center)
> * provide a program for new user education designed especially for secretaries, and assist in administering the program as needed.

Exhibit 4. *Pages from Brief of Plaintiff-Appellant* (Appendix H, 33-35)

14(e) of Plaintiff's Amended 3(g) Statement, Dr. Misek-Falkoff's sworn statement (Answer, Aff. ¶25), and Mr. Falkoff's sworn statement (Sur-reply, Aff. p7 ¶10[30]).

Indeed, the lower court noted that the employee's job was changed: "Plaintiff claims that the employer . . . removed her from her position as a computer analyst and office educator" (Order, p2); ". . . she was later moved to another facility, and her job assignment was modified." (Order p7); and a quotation, "'[He] [i.e., her manager] made more cuts in her job at that point.'"

Nonetheless, defendant begs the question of the job requirements at the time of the MDIP by talking about the job requirements of the staff systems analyst and office educator assignments, without saying that they obtained pre-1986, and not at the relevant time (Answer, Weis Aff ¶16; Garley Aff ¶11 et seq). Defendant also introduces into the record some pages from Dr. Misek-Falkoff's deposition testimony about her work when she was working as a staff systems analyst and

---

> Evaluation criteria include the quality of the program Linda defines, her ability to manage its implementation, and the completeness and effectiveness of documents she writes and presentations she puts together.

It is noteworthy that the execution of this assignment, the last as a staff systems analyst and office educator, and one indeed requiring sensitive interaction with others and timely results, was rated "CONSISTENTLY EXCEEDED the requirements of the job IN ALL KEY AREAS." (Emphasis in original)

[30] Sur-reply, Falkoff Aff., p7, clearly affirms that plaintiff's job was different, and points out where defendant's affidavit's deliberately confuse the chronology and are in error:

> . . . Weis (in ¶16) and Garley in ¶¶11-15, talk about Dr. Misek-Falkoff's job responsibilities in 1984-1985, as if they were the same in 1986-1987. She was still rated a Staff Systems Analyst until her MDIP termination, but there is ample testimony which need not be repeated here that her job, once she returned from brain-stem surgery and was being held in disfavor on account of the Keller defamation, was reduced to that of a programmer (not a dishonorable profession by any means, but not Dr. Misek-Falkoff's forte) with minimal requirements to personally interact with people. In fact, her management chose to isolate her from her group and steadily reduce her contacts both within the Research Division and outside it, so that she would not be missed by many people when they eventually let the axe fall.

office educator, that is, when she was designing systems and software[31]. Thus, the Court errs in accepting the defendant's description of the requirements of the employee's job in the period addressed by this action, and also when citing the "plaintiff's own definition of her duties at deposition" (Order p26) as the basis for judging whether she was "otherwise qualified" at the relevant time.

The formal written appraisals of the plaintiff's performance, conducted by the employer as a normal business practice, unequivocally show that she more than satisfied the requirements of her jobs (Answer, Ex 20 21 22 23; Order p5 Fn7). These appraisals were made by seasoned managers "trained in the evaluation process," and were monitored for quality by the Personnel Department (Answer Ex 6, Bergren deposition pp285 286). The written evaluations are intended by IBM to be definitive about all aspects of performance:

> The purpose of the Performance Planning, Counseling and Evaluation Program is to let employees know what is expected of them, how they are doing, and how they may improve their performance. It also provides a means of evaluating an individual's overall performance as a primary consideration for salary purposes. (Answer Ex 7, pages from IBM Manager's Manual[32])) (Underlines added)

An overall level of performance necessarily takes into account the effect of absence from the workplace, and the fact that attendance may be independently considered a "condition of employment" is orthogonal to this.

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[31] The deposition extract (Reply, Ex J) starts at a point that tends to obscure the fact that the plaintiff's description of her work relates to a type of assignment she no longer had after 1985. Nevertheless, if one recognizes that she was not expected to plan "conceptual systems" or "design software" in her final assignment, the true nature of the questioning is revealed (underline added):

> A. . . . I was part of the initial planning of these systems, meaning the conceptual system.
>
> Q. I will ask you in a few minutes about some examples of the software that you helped design, but at the moment I am just asking the physical steps, the functional steps of what you did to design software.

[32] Also see Answer Ex 26, page from "About Your Company," handbook for employees.